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NO. 92-5188

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JOE GUERRA,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED FOR REVIEW

Whether the weight of a toxic, uningestible waste material, not capable of distribution, should be included in calculating the weight of a "mixture or substance" containing a detectable amount of a controlled substance pursuant to section 2D1.1 of the Federal Sentencing Guidelines.

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are the following:

Joe Guerra, Petitioner-Defendant

Wayne Eugene Walker, Co-Defendant

Robert Bouvier, Co-Defendant

United States of America

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The District Court did not write an opinion in connection with the rendition of its judgment. The opinion of the Court of Appeals for the Fifth Circuit is reported at 960 F.2d 409 and is reproduced in the Appendix.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was rendered by the Court of Appeals for the Fifth Circuit on April 24, 1992. This Court has jurisdiction under 28 U.S.C. § 1254. Pursuant to Supreme Court Rule 13.1 and 28 U.S.C. § 2101(c), this petition is timely if it is filed by July 23, 1992.

STATUTE INVOLVED

U.S.S.G. § 2D1.1, n.*

*Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.

STATEMENT OF THE CASE

Joe Guerra was arrested on February 20, 1990, and subsequently accused in a two count indictment, along with Wayne Eugene Walker, Robert Bouvier, Michael Kelly and Lisa Prinz, of (1) conspiracy to possess with intent to distribute more than 100 grams of methamphetamine and (2) possession with intent to distribute methamphetamine. Guerra was convicted after trial by jury in the United States District Court for the Western District of Texas. The District Court had jurisdiction pursuant to 18 U.S.C. § 3231.

Guerra's co-defendants were operating a methamphetamine laboratory in Austin, Texas. Guerra had never been to the laboratory and did not know where it was located. Guerra did not even know Walker, Kelly or Prinz. However, he was linked to the conspiracy by virtue of having briefly stored and having transported across town certain precursor chemicals at the request of Bouvier. The facts essential to the question presented in this petition for writ of certiorari are recited at p. 411-412 of the opinion of the Court of Appeals. They are as follows:

> "In executing a search warrant at a residence where they found the methamphetamine laboratory, police seized a quantity of a toxic liquid substance consisting of phenylacetone and a small percentage of methamphetamine. At trial, a chemist testified that the liquid was probably a waste product left over from the methamphetamine manufacturing process."

There was no evidence and the government has never contended that the liquid waste material was capable of or intended for distribution to consumers. In fact, as also noted in the opinion of the Court of Appeals at p. 412, the government stipulated that "over ninety-five percent of the volume or weight of those liquids" was solvents.

In spite of this, the District Court considered the entire weight of the toxic liquid substance, in excess of fifty (50) pounds, for purposes of calculating Guerra's sentence. Relying on Fifth Circuit precedent which had previously interpreted section 2D1.1 of the Federal Sentencing Guidelines, the Fifth Circuit affirmed the District Court.

ARGUMENT FOR ALLOWANCE OF THE WRIT

SEVERAL COURTS OF APPEALS HAVE ISSUED CONFLICTING DECISIONS ON THE ISSUE OF WHETHER THE WEIGHT OF WASTE MATERIAL, NOT CAPABLE OF BEING DISTRIBUTED, SHOULD BE INCLUDED IN THE CALCULATION OF THE WEIGHT OF A CONTROLLED SUBSTANCE FOR SENTENCING PURPOSES. THUS, THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT. FURTHERMORE, THE FIFTH CIRCUIT'S DECISION ON THIS ISSUE CONFLICTS WITH THIS COURT'S RULING IN CHAPMAN V. UNITED STATES.

A. The Courts of Appeals Have Issued Conflicting Decisions

Several Courts of Appeals have rendered decisions in direct conflict on the issue of whether uningestible waste material, not intended for or capable of distribution, should be included when calculating the weight of a controlled substance for sentencing purposes. In United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991) the defendant was arrested while possessing 16 plastic bags which contained a liquid substance. The liquid substance contained cocaine. A government chemist emptied the contents of the bags into a container and established that the total weight of the liquid and cocaine was 241.6 grams. After extracting a powder substance from the liquid, the chemist disposed of what he characterized as "liquid waste." The remaining powder weighed 72.2 grams and was comprised of 7.2 grams of cocaine base and 65 grams of a cutting agent. Id. at 1233. In calculating the defendant's base offense level pursuant to section 2D1.1 of the Sentencing Guidelines, the district court included the gross weight of the entire contents of the bags. However, the Eleventh Circuit held that the defendant "should have been sentenced based on the 72.2 grams of usable powder consisting of cutting agent and cocaine base." Id. at 1238.

The Sixth Circuit reached a similar result in United States v. Jennings, 945 F.2d 129 (6th Cir. 1991). In Jennings, at the time of the defendants' arrest, a mixture was "cooking" in a crockpot. A government chemist conducted a test which revealed that the crockpot contained approximately 4,180 grams. 1.67 percent of which constituted a controlled substance. Id. at 134. The court stated that "If the crockpot contained only a small amount of methamphetamine mixed together with poisonous, unreacted chemicals and by-products, there would have been no possibility that the mixture could be distributed to consumers." Id. at 137 (emphasis added). At the same time, the court indicated that if the contents of the crockpot constituted some sort of cutting agent that would ultimately be distributed to consumers, then the entire weight should be considered when determining the defendants' sentences. Because the record was not clear with respect to the contents of the crockpot, the court remanded the case for an evidentiary hearing.

The Third Circuit has also indicated a similar construction of the Sentencing Guidelines in United States v. Touby, 909 F.2d 759, 773 (3rd Cir. 1990) wherein the court suggested that the weight of a cutting agent should be included in the calculation of a sentence, but the weight of unconsumable by-products should not be included, aff'd on other grounds, ____ U.S. ____, 111 S.Ct. 1752 (1991).

The Fifth Circuit has consistently rejected the argument that uningestible waste material, containing a detectable amount of a controlled substance, should not be included when calculating a defendant's offense level under the Federal Sentencing Guidelines. See United States v. Mueller, 902 F.2d 336, 345 (5th Cir. 1990); United States v. Butler, 895 F.2d 1016, 1018 (5th Cir. 1989), cert. denied, ___ U.S. ___, 111 S.Ct. 82 (1990); United States v. Baker, 883 F.2d 13, 14-15 (5th Cir.), cert. denied, 493 U.S. 983 (1989).

The Fifth Circuit is not alone in interpreting the Sentencing Guidelines in this manner. See United States v. Beltran-Felix, 934 F.2d 1075, 1076 (9th Cir. 1991) (holding that the entire weight of a 192-gram solution was to be included in calculating defendant's sentence even though only a small percentage was capable of distribution), cert. denied, ___ U.S. ___ 112 S. Ct. 955 (1992).

It is very clear that the various Courts of Appeals which have considered this issue are reaching diametrically opposed conclusions. "Because of the conflict, identical conduct in violation of the same federal laws may give rise to widely disparate sentences in different areas of the country." Fowner v. United States, ___ U.S. ___, 112 S.Ct. 1998, 2000 (1992) (White, J., dissenting). Thus, Congress' goal of an equitable and uniform sentencing structure, in which defendants are punished based upon the quantity of drugs they put on the market, is not being achieved.

B. The Fifth Circuit's Decision Conflicts With This Court's Ruling in Chapman v. United States

In the present case, the Court of Appeals for the Fifth Circuit relied upon its previous decisions as cited above and again rejected the contention that the weight of uningestible waste material should not be included when calculating the weight of a controlled substance for sentencing purposes. However, all of its previous decisions were issued prior to this Court's ruling in Chapman v. United States, ___ U.S. ___, 111 S.Ct. 1919 (1991). Petitioner brought this to the attention of the Court of Appeals, contending that Chapman effectively overruled the above-cited cases. Nevertheless, the Fifth Circuit stated that Chapman did not speak to the issue of whether the weight of liquid waste containing methamphetamine should serve as the basis for computing a defendant's offense level. The Court of Appeals based its finding on the fact that Chapman did not involve methamphetamine or liquid. A closer look at Chapman, however, reveals that it does speak to this issue rather clearly.

This Court's opinion in Chapman contained an extensive and very helpful interpretation of the statutory reference to "a mixture or substance containing a detectable amount of a controlled substance." This Court noted that in establishing the current penalties, "Congress adopted a 'market-oriented'

approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence." Chapman, 111 S.Ct. at 1925 (emphasis added). The intention of Congress was that "the penalties for drug trafficking . . . be graduated according to the weight of the drugs in whatever form they were found -- cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level." Id. at 1925 (emphasis added).

The above quoted material is a rational and reasonable analysis of Congress' intention in adopting the position that the entire weight of a mixture or a substance which contains a detectable amount of a controlled substance should be considered in calculating a defendant's sentence. However, to the same extent this Court's interpretation of the sentencing guideline is rational and reasonable, the interpretation of the Fifth Circuit in the present case and its previous decisions is irrational and unreasonable. Such an interpretation is in conflict with this Court's interpretation that Congress intended a "market-oriented" approach under which the total quantity of what is distributed, or capable of distribution, be used when determining the length of a defendant's sentence. See Chapman, 111 at S.Ct. 1925.

PRAYER

For the reasons stated above, Petitioner Joe Guerra respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

A. Opinion of the United States Court of Appeals for the Fifth Circuit

B. Judgment of the United States Court of Appeals for the Fifth Circuit

C. Fifth Circuit Order Denying Rehearing En Banc on the issue presented in this Petition for Writ of Certiorari

D. Judgment of the District Court

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

91-8396

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WAYNE EUGENE WALKER and
JOE GUERRA,
Defendants-Appellants.

* * * * * * * * * * * * * * * *

91-8423

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT BOUVIER,
Defendant-Appellant.

Appeals from the United States District Court for the Western District of Texas

April 24, 1992

Before GARWOOD and DEMOSS, Circuit Judges, and DUPLANTIER,* District Judge.

DUPLANTIER, District Judge:

Investigations by the Austin, Texas, Police Department

resulted in the discovery of a clandestine methamphetamine laboratory and the arrests of defendants, Robert Bouvier, Joe Guerra, and Wayne Walker, along with others.[1] Defendants were charged in a two-count indictment: count one charged a conspiracy to possess with intent to distribute more than 100 grams of methamphetamine; count two charged possession with intent to distribute methamphetamine. After defendant Bouvier successfully moved to sever his trial, defendants Walker and Guerra were convicted by a jury on both counts of the indictment. Bouvier subsequently entered into a plea agreement with the government, reserving his right to appeal the district court's denial of his pre-trial motions, and pleaded guilty to count one of the indictment.

In these consolidated appeals, all defendants contend that the district court improperly calculated the quantity of methamphetamine seized in determining their base offense levels under the Sentencing Guidelines. They also contend that the district court erred in denying their motions to dismiss based upon violations of the Speedy Trial Act, 18 U.S.C. § 3161, and based upon failure of the indictments to state an offense on the theory that methamphetamine has been "descheduled" as an unlawful drug. As noted hereafter, all three of these contentions are foreclosed by precedent in this circuit. In addition, defendant Walker

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* District Judge of the Eastern District of Louisiana, sitting by designation.

[1] Defendants were indicted along with Michael Kelly and Lisa Prinz, who are not appellants in this proceeding.

presents a sufficiency of the evidence claim, and defendant Guerra contends that the district court erred in denying his motion to suppress his confession and other evidence and in calculating his offense level for sentencing. Finding that the district court committed no error, we affirm.

WEIGHT OF METHAMPHETAMINE IN COMPUTING GUIDELINES

In executing a search warrant at a residence where they found the methamphetamine laboratory, police seized a quantity of a toxic liquid substance consisting of phenylacetone and a small percentage of methamphetamine. At trial, a chemist testified that the liquid was probably a waste product left over from the methamphetamine manufacturing process. At Bouvier's sentencing hearing, the government stipulated that "over ninety-five per cent of the volume or weight of those liquids" was solvents. Defendants contend that the district court erred in its application of the sentencing guidelines when it used the total weight of the liquid in calculating their offense levels.

This court has consistently rejected arguments similar to defendants'.[2] See United States v. Mueller, 902 F.2d 336 (5th Cir. 1990); United States v. Butler, 895 F.2d 1016 (5th Cir. 1989), cert. denied, 111 S. Ct. 82 (1990); United States v. Baker, 883 F.2d 13 (5th Cir.), cert. denied, 493 U.S. 983 (1989). In Baker, the court held that the district court correctly used the total

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[2] In the Fifth Circuit, "one 'panel may not overrule the decision, right or wrong, of a prior panel,'. . . in the absence of en banc reconsideration or superseding decision of the Supreme Court." Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir. 1991) (citations omitted).

weight of a liquid substance containing methamphetamine in calculating defendant's base offense level, despite that fact that most of the liquid was waste material. Baker, 883 F.2d at 14-15.[3]

In Butler, the court found that defendant's offense level had been properly calculated based upon thirty-eight and one-half pounds of a liquid consisting of seven to fourteen grams of methamphetamine and the remainder "lye water." Butler, 895 F.2d at 1018. The court found that the defendant's argument was foreclosed by the specific language[4] of the guidelines and by the holding in Baker. Finally, in Mueller, the court rejected defendant's argument that his offense level had been calculated improperly based upon 8.5 gallons of methamphetamine, because the mixture seized consisted largely of acetone rather than methamphetamine. Mueller, 902 F.2d at 345. Again, the court confirmed that Baker foreclosed such an argument. Id.

Defendants assert that the Supreme Court's recent decision in Chapman v. United States, 111 S. Ct. 1919 (1991), effectively overruled Baker and its progeny. We disagree. In Chapman, the Court held that the weight of the blotter paper used to distribute

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[3] We note that for sentencing purposes Congress has provided that 100 grams of "methamphetamine" is equivalent to a kilogram of "a mixture or substance containing a detectable amount of methamphetamine," 21 U.S.C. § 841(b)(1)(A)(viii), and 10 grams of "methamphetamine" is equivalent to 100 grams of "a mixture or substance containing a detectable amount of methamphetamine." 21 U.S.C. § 841(b)(1)(B)(viii).

[4] The guidelines provide: "Unless otherwise specified, the weight of a controlled substance . . . refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Note following Drug Quantity Table, United States Sentencing Guidelines § 2D1.1.

LSD and not simply the weight of the pure LSD should be used for sentencing, because the blotter paper is a mixture or substance containing a detectable amount of LSD. Id. at 1922. The Court found that the words "mixture" and "substance" in 21 U.S.C. § 841(b)(1)(B)(v) and the sentencing guidelines, given their ordinary meaning, would include the blotter paper. Id. at 1925-26. It also found that such a sentencing scheme was rational because, although blotter paper is not used to "dilute" LSD, it facilitates the distribution of the drug and makes LSD easier to "transport, store, conceal, and sell." Id. at 1928. Chapman did not involve methamphetamine; nor did it involve a liquid. Hence, the Court did not speak to the issue of whether the weight of liquid waste containing methamphetamine should serve as a basis for computing a defendant's offense level. Thus, Chapman did not overrule Baker. To the contrary, much of the language in Chapman supports this court's decision in Baker.[5]

In sentencing defendants, the district court correctly used the entire weight of a mixture or substance containing a detectable amount of methamphetamine.

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[5] The Sixth and Eleventh Circuits have held that liquid waste should not be included in determining the relevant amount of drugs for sentencing purposes. United States v. Jennings, 945 F.2d 129 (6th Cir. 1991); United States v. Rolande-Gabriel, 938 F.2d 1231, (11th Cir. 1991). Contrary to defendants' arguments, those courts did not find that Chapman required such a conclusion. In fact, they distinguished Chapman in reaching their conclusions. Jennings, 945 F.2d at 136; Rolande-Gabriel, 938 F.2d at 1235-36. In addition, the issue of whether liquid waste should be used in weighing drugs seemed to be one of first impression in both circuits. Thus, those courts were not bound by previous decisions in their own circuits, as we are.

SPEEDY TRIAL ACT

All defendants contend that the district court erred in denying their motions to dismiss based upon violations of the Speedy Trial Act, 18 U.S.C. § 3161. The Act requires that "the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date of the information or indictment . . .." 18 U.S.C. § 3161(c)(1). The Act also provides for the exclusion of "[a]ny period of delay resulting from other proceedings concerning the defendant, including . . . delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion . . .." 18 U.S.C. § 3161(h)(1)(F).

Defendants were indicted on March 6, 1990. On March 26 they filed a variety of pre-trial motions, which were set for hearing. Before the motions were heard, defendants entered into plea agreements with the government and entered pleas of guilty. In October, the district court rejected defendants' guilty pleas and reset the pre-trial motions for hearing on January 4, 1991. Defendants filed additional pre-trial motions before January 4. Defendants concede that, aside from the twenty days between the filing of the indictments and the first pre-trial motions, all time up until January 3 should be excluded under the Act. The excludability of the delays after January 3 is at issue.

On January 3, the district court sua sponte continued the hearing on the pre-trial motions until February 19. On February

13, the court continued the hearing sua sponte until April 15. On April 18, the court granted the government's motion to continue the hearing based upon a death in the family and hospitalization of the wife of the Assistant United States Attorney handling the case. On April 19, May 6, and May 9, Walker, Bouvier, and Guerra, respectively, filed their motions to dismiss based on violations of the Speedy Trial Act, which the district court denied orally after a hearing on all of the pre-trial motions, on May 20-21. The court filed a written order regarding the rulings a few days later.[6]

Defendants contend that because the delays after January 3 were not requested or caused by them, those delays should not be excluded from computation of time under the Act. An identical argument was rejected in United States v. Horton, 705 F.2d 1414, 1416 (5th Cir.), cert. denied, 464 U.S. 997 (1983). There, defendants attacked the exclusion of the period of time during which motions were pending as unjustified, "asserting that little or none of it was occasioned at their request or on their account." Id. "Even assuming this to be so," the court concluded that defendants' argument must fail because the Act is "all but absolute" in excluding time during which motions are pending. Id. An exception might be justified in a particularly egregious case, for example, when defendants have presented "repeated unsuccessful requests for hearings or . . . other credible indication that a hearing had been deliberately refused with intent to evade the

[6] Trial of Walker and Guerra commenced on June 3, 1991. Bouvier entered his plea of guilty to count one of the indictment on June 24, 1991.

sanctions of the Act." Id. Like the defendants in Horton, defendants have not presented such a case here. Defendants conceded at oral argument that during the pendency of their motions they neither complained of the delay nor did anything to expedite a decision on their motions.

Defendants Walker and Guerra also complain that the district court erred by not following the requirements of section (h)(8)(A) of the Act, which excludes

> [a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(8)(A). The district court's orders continuing the hearings sua sponte did not contain such a finding, although the court made such a finding with regard to all continuances in its written order denying defendants' pre-trial motions.

It is not necessary to determine whether the delays at issue should be excluded under section 8(A), because the delays are specifically excluded by section 1(F) as delays resulting from pre-trial motions. Delays resulting from pre-trial motions "'will toll the trial clock indefinitely; there is no independent requirement that the delay attributable to the motions be reasonable.'" United States v. Santoyo, 890 F.2d 726, 728 (5th Cir. 1989), cert. denied, 495 U.S. 959 (1990) (quoting United States v. Kington, 875 F.2d 1091, 1109 (5th Cir. 1989) (citations omitted)).

METHAMPHETAMINE NOT DESCHEDULED

Defendants also contend that the district court erred in denying their motions to dismiss the indictments for failure to charge an offense: they argue that the Drug Enforcement Administration descheduled methamphetamine and failed to follow the proper procedure for rescheduling it. Thus, they reason, methamphetamine is not a controlled substance.

Defendants argue that methamphetamine was descheduled in 1976 when the DEA descheduled Rynal Spray and Vicks Inhaler, products containing diluted isomers of methamphetamine. Defendants' argument is precluded by the Fifth Circuit's recent opinion in United States v. Martinez, 950 F.2d 222 (5th Cir. 1991). There, the court concluded that, although the DEA descheduled Rynal and Vicks Inhaler, the DEA did not deschedule all forms of methamphetamine, and thus, "methamphetamine is still properly classified as a schedule II controlled substance." Id. at 224.[7]

WALKER'S SUFFICIENCY OF THE EVIDENCE CLAIM

Defendant Walker contends that even if methamphetamine is properly scheduled as a controlled substance, the evidence at trial was insufficient to show that the methamphetamine introduced by the government was not one of the substances descheduled by 21 C.F.R. § 1308.22. Martinez makes clear that the substances descheduled by section 1308.22 were Rynal Spray and Vicks Inhaler, which contain specific quantities of controlled substances. The chart

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[7] In so concluding, the Fifth Circuit agreed with decisions of the Eighth and Ninth Circuits. See United States v. Durham, 941 F.2d 886, 889-90 (9th Cir. 1991); United States v. Roark, 924 F.2d 1426, 1428 (8th Cir. 1991).

contained in section 1308.22 lists excluded nonnarcotic products and designates for each product a company name, trade name, controlled substance contained therein, and specific quantity of the controlled substance. The controlled substances listed in the chart were not descheduled altogether; they were descheduled only in the form of Rynal Spray and Vicks Inhaler.[8]

Thus, the jury's verdict must be affirmed if any rational trier of fact could have found beyond a reasonable doubt that the substance seized was methamphetamine, but not Rynal Spray or Vicks Inhaler. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Carrasco, 830 F.2d 41, 43 (5th Cir. 1987). Considering the evidence in the light most favorable to the government, and accepting all reasonable inferences that tend to support the jury's verdict, we affirm the verdict. Carrasco, 830 F.2d at 43-44; United States v. Marx, 635 F.2d 436 (5th Cir. 1981). Chemist Ralph Owen testified that the methamphetamine at issue was not Vicks Inhaler or Rynal Spray. Likewise, Chemist Anthony Arnold testified that the methamphetamine was not in the form of Rynal Spray or Vicks Inhaler. Given this testimony, a rational trier of fact could nave found beyond a reasonable doubt that the methamphetamine introduced by the government was an illegal controlled substance.

GUERRA'S MOTION TO SUPPRESS

Defendant Guerra contends that the district court erred in denying his motion to suppress the physical evidence obtained as a

[8] The current version of section 1308.22 no longer lists Rynal Spray as an excluded product. See 21 C.F.R. § 1308.22 (1991).

result of his warrantless arrest, as well as the confessions that he made following the arrest. Guerra contends that the physical evidence and confession were fruits of an arrest that was unlawful under Texas law and, as such, should be suppressed. The government contends that federal law controls, and that probable cause existed for Guerra's arrest, making it valid under federal law. Alternatively, the government asserts that Guerra's arrest was valid also under Texas law.

Defendant Guerra's argument to the contrary, the proper inquiry in determining whether to exclude the evidence at issue is not whether the state officials' actions in arresting him were "lawful" or "valid under state law." The question that a federal court must ask when evidence secured by state officials is to be used as evidence against a defendant accused of a federal offense is whether the actions of the state officials in securing the evidence violated the Fourth Amendment to the United States Constitution. This is so because, absent an exception, the exclusionary rule requires that evidence obtained in violation of the Fourth Amendment be suppressed. The exclusionary rule was created to discourage violations of the Fourth Amendment, not violations of state law. See Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

In United States v. Garcia, 676 F.2d 1086 (5th Cir. 1982), this court excluded evidence that it found to have been obtained pursuant to arrests by state officers because the court determined that the arrests were illegal under Texas law. The Supreme Court

vacated Garcia and remanded to the panel for reconsideration in light of United States v. Ross, 456 U.S. 798 (1982). See Garcia, 676 F.2d 1086 (5th Cir. 1982), vacated and remanded, 103 S. Ct. 3105 (1983). Ross discusses the Fourth Amendment standards governing a warrantless search of a container in an automobile. "By remanding Garcia for reconsideration in light of the fourth amendment standards announced in Ross, the Court perforce instructed that state law did not control the case and that the admissibility of evidence depends on the legality of the search and seizure under federal law." United States v. Mahoney, 712 F.2d 956, 959 (5th Cir. 1983), cert. denied, 468 U.S. 1220 (1984). See also United States v. Mitchell, 783 F.2d 971, 973 (10th Cir.), cert. denied, 479 U.S. 860 (1986).

Whether the Fourth Amendment has been violated is determined solely by looking to federal law on the subject. See California v. Greenwood, 108 S. Ct. 1625 (1988). There, the Supreme Court rejected a claim that the Fourth Amendment required suppression of evidence resulting from a warrantless search and seizure that was illegal under California law.

> Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution. We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs.

Id. at 1630. The Fifth Circuit has recognized that

> [b]ecause it is a creature of the federal courts and because it ought to be applied in a manner that promotes uniformity in federal cases, federal law must guide our decision whether to apply the exclusionary rule whether

> or not the legality of the underlying arrest or search turns on state law.

Mahoney, 712 F.2d at 959.

We are aware that in United States v. Di Re, 332 U.S. 581 (1947), the Supreme Court reversed a federal conviction because it was based upon evidence obtained from an arrest that was illegal under state law. We agree with the Tenth Circuit's conclusion that Di Re "was rejected, by implication," in Elkins v. United States, 364 U.S. 206 (1960): "'The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.'" United States v. Miller, 452 F.2d 731, 733 (10th Cir. 1971), cert. denied, 407 U.S. 926 (1972) (quoting Elkins, 364 U.S. at 224). See Mahoney, 712 F.2d at 959, n.3. A commentator has suggested that "Di Re is simply an instance of the Court utilizing its supervisory power to exclude from a federal prosecution evidence obtained pursuant to an illegal but constitutional federal arrest" by a local police officer. LaFave, Search and Seizure, § 1.5(b) at 107. If that is so, United States v. Payner, 447 U.S. 727 (1980), makes clear that the Court is no longer interested in using its supervisory power to exclude evidence obtained unlawfully but under circumstances not violative of the Fourth Amendment. A federal court should not "use its supervisory power to suppress evidence tainted by gross illegalities that did not infringe the defendant's constitutional rights." Id. at 733.

The Fourth Amendment dictates that a warrantless arrest be based upon probable cause. United States v. De Los Santos, 810

F.2d 1326, 1336 (5th Cir.), cert. denied, 484 U.S. 978 (1987). Thus, in determining whether to suppress the evidence at issue, the inquiry is whether the officers had probable cause to arrest Guerra. "Probable cause 'exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed.'" Id. (quoting United States v. Antone, 753 F.2d 1301, 1304 (5th Cir.), cert. denied, 474 U.S. 818 (1985)). "The arresting officer does not have to have personal knowledge of all the facts constituting probable cause; it can rest upon the collective knowledge of the police when there is communication between them." Id. (citing United States v. Webster, 750 F.2d 307, 323 (5th Cir. 1984), cert. denied, 471 U.S. 1106 (1985)).

It is clear that probable cause existed for the officers to arrest Guerra and that the district court did not err in denying Guerra's motion to suppress. Before Guerra's arrest, Austin Police Department Officer Randall Milstead learned from a confidential informant that Guerra was in possession of precursor chemicals used to manufacture methamphetamine. In connection with the local law enforcement officials, Gray Hildreth, a special agent with the DEA, also investigated allegations that Guerra was selling methamphetamine. A confidential informant told Agent Hildreth that Guerra and defendant Bouvier were associates and that they had taken the informant to a residence where chemicals were stored for the manufacture of methamphetamine.

Jean Messina, who later became a cooperating individual, told an undercover officer that she could provide him with methamphetamine and took the officer to the Silvermine Hotel. While the officer stayed in the car, Messina went into a hotel room and returned approximately one half hour later with methamphetamine. Messina was arrested. When interviewed, she agreed to cooperate with the officers. She told them that she had received the methamphetamine from Guerra, who was inside the Silvermine Hotel with Ladawn Page. In a telephone call to the hotel room, Messina arranged delivery of additional methamphetamine. The phone call was recorded by the officers with Messina's consent. When Guerra and Page left the hotel, officers arrested them.[9] The facts known to the officers before they arrested Guerra clearly were sufficient to cause a person of reasonable caution to believe that an offense had been or was being committed.

Guerra also contends that the district court erred in refusing to suppress his confession on the ground that it was not voluntarily given. After conducting a hearing at which Ladawn Page and several police officers testified, the district court determined that Guerra's confession was voluntary. We accept a trial court's credibility choices and factual findings based upon live testimony at a suppression hearing unless the findings are

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[9] Guerra was in possession of methamphetamine and precursor chemicals used to manufacture methamphetamine. After having been brought to the Austin Police Department and read his rights, Guerra made incriminating oral and written statements.

clearly erroneous or influenced by an incorrect view of the law. United States v. Rogers, 906 F.2d 189, 190 (5th Cir. 1990). The district court credited the testimony of the officers present during Guerra's confession to the effect that Guerra desired to cooperate and that he voluntarily made oral statements and signed the written statement. The court's credibility choices and factual findings are not clearly erroneous.

CALCULATION OF GUERRA'S BASE OFFENSE LEVEL

Finally, defendant Guerra contends that his base offense level was calculated in such a way as to violate due process and penalize him for having exercised his right to a trial. He comes to this conclusion by comparing the presentence report prepared at the time of the plea agreement that was rejected by the district court with the presentence report prepared after trial. He complains specifically of three changes. First, while the initial report characterized Guerra as a "minor participant" in the conspiracy, the post-trial report characterized him as an "average participant," increasing his offense level by two points. Second, the initial report deducted two points for acceptance of responsibility, and that deduction was not allowed after trial. Finally, the post-trial report added two points for obstruction of justice, based upon a letter written by Guerra to his girlfriend, Ladawn Page, who was to be a witness at his trial.

"The district court's sentence will be upheld so long as it results from a correct application of the guidelines to factual findings that are not clearly erroneous." United States v. Rivera,

898 F.2d 442, 445 (5th Cir. 1990) (citing United States v. Buenrostro, 868 F.2d 135, 136-37 (5th Cir. 1989)). Guerra's argument is frivolous. He cites no authority for his position; nor does he point to any evidence to show that the district court was clearly erroneous in concluding that Guerra was an average participant, that he had not accepted responsibility, or that he had obstructed justice. To the contrary, each of the changes appears to have been proper, because they reflected testimony and evidence adduced at trial. The trial judge was intimately familiar with the facts of this case; the findings that he made in calculating Guerra's base offense level are not clearly erroneous.

CONCLUSION

Finding no error, we affirm the convictions and sentences of all defendants.

UNITED STATES COURT OF APPEALS

FILED

JUN 9 1992

U. S. DISTRICT COURT
CLERK'S OFFICE
By _____ Deputy

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED

APR 24 1992

GILBERT F. GANUCHEAU
CLERK

No. 91-8396

D.C. Docket No. A-90-CR-30-05, 04

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WAYNE EUGENE WALKER

Defendant -Appellant .

Appeals from the United States District Court for the Western District of Texas

Before GARWOOD and DeMOSS, Circuit Judges, and DUPLANTIER[1], District Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

April 24, 1992

ISSUED AS MANDATE: JUN 5 1992

A true copy
Test
Clerk, U. S. Court of Appeals, Fifth Circuit
By _____ Deputy JUN 5 1992
New Orleans, Louisiana

[1]District Judge of the Eastern District of Louisiana, sitting by designation.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8396

UNITED STATES OF AMERICA,

Plaintiff-Appellees,

versus

WAYNE EUGENE WALKER, and
JOE GUERRA,

Defendants-Appellants.

U.S. COURT OF APPEALS
FILED

MAY 26 1992

GILBERT F. GANUCHEAU
CLERK

Appeal from the United States District Court for the Western District of Texas

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion 4/24/91, 5 Cir., 1992, ____F.2d____)

(May 26, 1992)

Before GARWOOD, DeMOSS, Circuit Judges, and DUPLANTIER, District Judge.

PER CURIAM:

(✓) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.
REHG-9

APPENDIX C

Reh. fld. 5/8/92

UNITED STATES DISTRICT COURT
Western District of Texas

UNITED STATES OF AMERICA

v.

Case Number: A-90-CR-30(4)
USAO Number: 90-01068

JOE GUERRA
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, JOE GUERRA, was represented by James Nias.

The defendant was found guilty on count(s) 1 and 2 of the indictment by a jury verdict on June 6, 1991 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
CONTRARY TO 21:841(a)(1), IN VIOLATION OF 21:846	CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE METHAMPHETAMINE	02/20/90	1
21:841(a)(1)	POSSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE	02/20/90	2

As pronounced on **JULY 9, 1991**, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $ 100.00, for count(s) 1 and 2 of the indictment, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 9th day of July, 1991.

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

Defendant's SSN: 461-23-9121
Defendant's Date of Birth: 06/25/57
Defendant's address: c/o HAYS COUNTY JAIL, 1307 Old Uhland Road, San Marcos, TX 78666

APPENDIX D

Defendant: JOE GUERRA
Case Number: A-90-CR-30(4)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **TWO HUNDRED AND THIRTY FIVE MONTHS** on each of Counts I and 2. IT IS FURTHER ORDERED that the period of imprisonment imposed on Count 2 shall run concurrently to the period of imprisonment imposed on Count 1.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be incarcerated at a federal correctional institution where he may receive counselling for substance abuse.

The defendant is continued in Custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: JOE GUERRA
Case Number: A-90-CR-30(4)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS**.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

X If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

X The defendant shall neither own nor possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: JOE GUERRA
Case Number: A-90-CR-30(4)

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except: The Court awarded a two level increase in the offense level for obstruction of justice, increasing the offense level from 36 to 38.

Guideline Range Determined by the Court:

Total Offense Level:	38
Criminal History Category:	I
Imprisonment Range:	235 months to 293 months
Supervised Release Range:	at least 5 years
Fine Range:	$25,000 to $4,000,000
Restitution:	$ N/A

The fine is waived because of the defendant's inability to pay.

The sentence is within the guidelines range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.

NO. 92-5188

ORIGINAL

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JOE GUERRA,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

The undersigned counsel of record for Petitioner Joe Guerra hereby certifies that on this 20TH day of July, 1992, true and correct copies of the foregoing Petition for Writ of Certiorari with Appendix, and the foregoing Motion for Leave to Proceed in Forma Pauperis, have been served by depositing the same in a United States Post Office or mailbox, with first class postage prepaid, addressed to counsel of record of all parties required to be served, at their proper post office addresses, as follows:

Ms. Diane D. Kirstein
U.S. Attorney's Office
727 E. Durango
Suite A-601
San Antonio, Texas 78206
512/229-6500
ATTORNEY FOR THE UNITED STATES OF AMERICA

Solicitor General
Department of Justice
Washington, D.C. 20530
202/514-2000
ATTORNEY FOR THE UNITED STATES OF AMERICA

. . 7238d/7-18-92/JMN

Mr. Kenneth E. Houp, Jr.
Attorney at Law
910 West Avenue
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512/477-4434
ATTORNEY FOR WAYNE EUGENE WALKER

Mr. David A. Wright
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ATTORNEY FOR ROBERT BOUVIER

Respectfully submitted,

Small, Craig & Werkenthin
A Professional Corporation
100 Congress, Suite 1100
Austin, Texas 78701
512-472-8355
Fax No. 512-320-9734

By: _____
James N. Nias
Counsel of Record
Texas State Bar No. 14986000

Attorneys for Petitioner

OPPOSITION BRIEF UNAVAILABLE FOR FILMING AT THIS TIME